

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMER INDUSTRIAL TECHNOLOGIES,
INC.,

Plaintiff,

v.

MLEA, INC.; JOHN K. WIEDEMANN; and
all others conspiring, acting in concert, or
otherwise participating with them or acting in
their aid or behalf,

Defendants.

JUDGE MARY A. MCLAUGHLIN

CASE NO.: 02-CV-2902

ORDER

AND NOW, this ____ day of _____, 2002, upon consideration of Plaintiff's Motion to Compel Discovery, and any response thereto, it is hereby **ORDERED** that Plaintiff's Motion is **GRANTED** and Defendants are required to produce a full and complete response to Plaintiff's First Request for Production of Documents, including Wiedemann's invoices to MLEA for consulting services; documents retrieved from John Wiedemann's personal computer currently used at MLEA; and all withheld proprietary documents retrieved as part of the computer inspections already conducted in this matter within three (3) days of the date of this Order or suffer sanctions upon application to this Court.

IT IS SO ORDERED.

J.

Date: August 8, 2002

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Defendants.

JUDGE MARY A. MCCLAUGHLIN

CASE NO.: 02-CV-2902

FILED AUG - 8 2002

PLAINTIFF'S MOTION TO COMPEL DISCOVERY

Plaintiff, Amer Industrial Technologies, Inc. ("Plaintiff" or "AIT"), by and through counsel and pursuant to Rule 37 of the Federal Rules of Civil Procedure, moves this Court to compel Defendants, MLEA, Inc. ("MLEA") and John K. Wiedemann ("Wiedemann") (hereinafter collectively referred to as "Defendants"), to produce non-privileged computer documents retrieved by Plaintiff's computer expert as part of the computer inspections previously ordered in this case, computer documents retrieved from Wiedemann's personal computer currently used at MLEA, and Wiedemann's invoices for consulting services provided to MLEA. Defendants have either delayed the production of or intentionally withheld these documents in violation of this Court's Order and/or Defendants' obligations under Rule 34 of the Federal Rules of Civil Procedure. Despite Plaintiff's good faith efforts to resolve this discovery dispute, Defendants have continued to refuse to produce the subject documents. Accordingly, Plaintiff turns to this Court for assistance.

In support of this Motion, Plaintiff relies upon the Memorandum of Law in Support attached hereto and incorporated by reference herein.

Respectfully submitted,

BLANK ROME COMISKY & McCAULEY LLP

A handwritten signature in black ink, appearing to read 'R. Meyer', is written over a horizontal line.

RICHARD S. MEYER
DONALD D. GAMBURG
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Date: August 8, 2002

Attorneys for Plaintiff,
AMER INDUSTRIAL TECHNOLOGIES, INC.

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**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION TO COMPEL DISCOVERY**

I. INTRODUCTION

Plaintiff, Amer Industrial Technologies, Inc. ("Plaintiff" or "AIT"), requests that this Court order Defendants, MLEA, Inc. ("MLEA") and John K. Wiedemann ("Wiedemann") (collectively referred to as "Defendants"), produce (i) all non-privileged computer documents retrieved by Plaintiff's computer expert as part of the computer inspections previously ordered in this case, (ii) computer documents retrieved from Wiedemann's personal computer currently used at MLEA, and (iii) Wiedemann's invoices for consulting services provided to MLEA.

On May 31, 2002, this Court ordered that the parties serve abbreviated requests for production of documents by 5:00 p.m. on May 31, 2002. (*See* Order, attached as Exhibit "A"). As such, on May 31, 2002, Plaintiff served on Defendants Plaintiff's First Request for Production of Documents. (*See* Plaintiff's First Request for Production of Documents is attached as Exhibit "B"). Request No. 5 of Plaintiff's First Request for Production of Documents seeks

the production of “[a]ll documents between MLEA and Wiedemann.” (*Id.*). During the deposition of Defendants’ witness, Theodore DelGaizo (MLEA President/CEO), on July 31, 2002, Plaintiff discovered that Wiedemann submitted invoices for consulting services provided to MLEA during the period from on or about January 22, 2002 through on or about March 25, 2002. (*See* relevant portions of DelGaizo deposition transcript, attached as Exhibit “C”). On August 7, 2002, Plaintiff requested immediate compliance with Defendants’ discovery obligations to produce these documents. (*See* Meyer Correspondence dated August 7, 2002, attached as Exhibit “D”). Despite the deposition testimony and the obvious coverage by Request No. 5, Defendants have failed to produce these invoices, which are critical to this case.

On June 18, 2002, this Court entered a Confidentiality Stipulation and Order (“Confidentiality Order”) pursuant to which all confidential and proprietary documents would be produced in this matter. (*See* Confidentiality Order, attached as Exhibit “E”). The Confidentiality Order also sets forth the procedure for computer inspections. In accordance with this procedure, Plaintiff’s computer expert is to examine Defendants’ computers by (i) creating disc duplicates of the subject computers, (ii) creating hard copies of the desired documents from these discs, (iii) producing the desired documents to Defendants’ attorney, and then (iv) Defendants’ attorney reviewing the documents for privileged matters and producing all non-privileged documents within three (3) days of receipt of same from the computer expert. (*Id.*).

Defendants have consistently failed to meet the three-day production requirement under the Confidentiality Order:

Subject Computer	Date Defendants' Counsel Received Documents	Date Documents Delivered to Plaintiff's Counsel	Total Days
Wiedemann Laptop	July 3, 2002	July 10, 2002	7
Manzon Old PC	July 16, 2002	July 24, 2002	8
Wiedemann Old PC	July 24, 2002	July 31, 2002	7
Manzon New PC	July 29, 2002	August 2, 2002	4

(See Yavorowski Correspondence dated July 3, 16, 24, and 29, 2002; Gamburg E-mail dated July 10, 2002; and Nix Correspondence dated July 24, 31 and August 2, 2002, all of which are attached as Exhibit "F"). With respect to the last computer inspected by Plaintiff's expert (Wiedemann's personal computer currently used at MLEA), the computer expert sent, by overnight mail, the retrieved documents to Defendants' counsel on July 31, 2002. (See Yavorowski Correspondence, dated July 31, 2002, attached as Exhibit "G"). Thus, Defendants' counsel received these documents on August 1, 2002. In accordance with the Confidentiality Order, Defendants' attorneys should have produced the retrieved documents, excluding all privileged documents, by August 4, 2002. On August 7, 2002, Plaintiff requested that Defendants rectify this discovery failure. (See Exhibit "D"). Defendants have yet to produce these documents.

Defendants' untimely production of computer documents have been incomplete as well. Indeed, claiming that documents are not their property but rather the property of WSRC or Accurate Machine, Defendants have withheld numerous documents retrieved by the computer expert:

Computer	Document Number
Manzon New PC	0007
Wiedemann Old PC	0040
	0126
	0127
	0128
	0133
	0138
	0139
	0140
	0141
	0142
	0143
	0144
	0150
	0151
	0152
	0239
	0240
	0241
Manzon Old PC	0526
	0534
	0535
	0536
	0537
	0538
	0540

(See Privilege Logs attached to Nix Correspondence, attached as part of Exhibit "F").

Defendants have withheld these documents despite the fact that the Confidentiality Order only permits withholding privileged documents. (See Exhibit "E"). As for proprietary documents, Defendants are to stamp the documents "Confidential" and produce them. (*Id.*). Plaintiff has repeatedly objected to Defendants withholding such documents and have requested production of same. Nonetheless, Defendants have yet to produce these documents.

Due to the deficiencies and delays detailed above, Defendants have almost entirely failed to produce documents and/or information critical to Plaintiff's claims in this case. Indeed, as of the date of this Motion and despite Plaintiff's repeated demands, Plaintiff has failed to provide: (i) the withheld "proprietary" documents from the retrieved computer documents; (ii) the computer documents retrieved from Wiedemann's new personal computer utilized at MLEA; and (iii) Wiedemann's invoices to MLEA for consulting service which cover the time period when MLEA prepared its Savannah River Project proposal. Defendants' failure to provide the discovery discussed above is in violation of the Federal Rules of Civil Procedure and has significantly hindered Plaintiff in its ability to both fully discover and evaluate this lawsuit and to prepare its case.

II. LAW AND ARGUMENT

Defendants are required to produce the withheld non-privileged computer documents. Rule 34(a) of the Federal Rules of Civil Procedure states that "[a]ny party may serve on any other party a request [to produce documents] which constitute or contain matters within the scope of Rule 26(b) and which are in the *possession, custody or control* of the party upon whom the request is served." (Emphasis added).

It is undisputed that the subject documents were retrieved from Defendants' computers. There is no dispute that such documents are within the scope of discovery under Rule 26(b). In accordance with this Court's Order and Rule 34, the documents should be produced.

Nonetheless, Defendants argue that the documents are the property of a third party, WSRC or Accurate Machine, and thus have refused to produce the documents on this basis. Notwithstanding Defendants' objections, it is well established that a party must produce all documents within its possession regardless whether such documents are not its property. *See, In*

re Bankers Trust Co., 61 F.3d 465, 470-471 (6th Cir. 1995); *Kravitz v. Jewelry Basics, Inc.*, 1990 U.S. Dist. LEXIS 4264, *10-12 (E.D.Pa. 1990). Consequently, Defendants' objection lacks any basis in law, and Defendants should be compelled to produce the documents.

Likewise, there is absolutely no excuse for Defendants' failure to produce Wiedemann's invoices and the documents retrieved from Wiedemann's personal computer currently used at MLEA. The invoices constitute "documents between MLEA and Wiedemann." As such, the invoices clearly should have been produced in response to Request No. 5 of Plaintiff's First Request for Production of Documents.

The computer documents retrieved from Wiedemann's personal computer currently used at MLEA also should have been produced. Defendants' counsel received these documents from Plaintiff's computer expert on August 1, 2002. The Confidentiality Order requires Defendants to produce all non-privileged documents within three (3) days of receipt of such documents from the computer expert. Nonetheless, as of the date of this Motion, Plaintiff has still not received these documents. Defendants' actions violate this Court's Confidentiality Order. Accordingly, Defendants should be compelled to produce these documents immediately.

III. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests this Court enter an Order requiring Defendants to provide full and complete responses to Plaintiff's First Request for Production of Documents, including Wiedemann's invoices for consulting services provided to MLEA; the received and yet produced computer documents retrieved from Wiedemann's personal computer currently used at MLEA; and all non-privileged computer documents retrieved by Plaintiff's computer expert as part of the computer inspections conducted in this matter, including all withheld proprietary and confidential documents. Plaintiff also requests that

this Court impose all appropriate sanctions on Defendants, including, but not limited to, the payment of all attorneys' fees associated with bringing this Motion.

Respectfully submitted,

BLANK ROME COMISKY & McCAULEY LLP

A handwritten signature in black ink, appearing to read 'R. Meyer', is written over a horizontal line.

RICHARD S. MEYER
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Date: August 8, 2002

Attorneys for Plaintiff,
AMER INDUSTRIAL TECHNOLOGIES, INC.

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Plaintiff's Motion to Compel Discovery, Memorandum of Law in Support thereof, Local Rule 26.1(f) Certification, and proposed Order were served via hand delivery, this 8th day of August, 2002 upon the following Attorney for Defendants:

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Philip J. Katauskas, Esquire
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Attorney for Plaintiff

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LOCAL RULE 26.1(f) CERTIFICATION

I, Donald D. Gamburg, hereby certify that all reasonable efforts have been made,
including letters and telephone conversations, to in good faith resolve the discovery issues in
dispute as outlined in Plaintiff's Motion to Compel Discovery.


DONALD D. GAMBURG

Date: August 8, 2002